No. 80-1351

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALBEMARLE COUNTY SCHOOL BOARD,
Petitioner,

v.

SUSAN PAXMAN,
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JAMES L. SANDERLIN*
JOHN W. BURKE, III
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
(804) 644-4131

Attorneys for
Albemarle County School Board

September, 1980

*Counsel of Record

QUESTIONS PRESENTED

Whether the Albemarle County School Board violated the constitutional rights of Mrs. Paxman?

Whether the United States Court of Appeals For the Fourth Circuit in *Paxman, et al.*, v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980), properly awarded respondent attorneys' fees under 42 U.S.C. § 1988?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISION 2

STATEMENT OF THE CASE 3

REASONS FOR ALLOWANCE OF THE WRIT 5

A. Mrs. Paxman Suffered No Constitutional Wrong..... 5

B. The Fourth Circuit Court Of Appeals Improperly Awarded Attorneys' Fees To Mrs. Paxman 6

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Cleveland Board of Education v. *LaFleur*, 414 U.S. 632 (1974) 4, 5, 6

Cohen v. *Chesterfield County Board of Education*, 473 F.2d 395 (4th Cir. 1973) (en banc) *rev'd sub nom., Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974) 4

Paxman, et al. v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980) . 1, 2

Paxman, et al. v. *Wilkerson, et al.*, 390 F. Supp. 442 (E.D. Va. 1975) 2

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343(3) 3

28 U.S.C. § 2201 3

42 U.S.C. § 1988 ..... 1, 2

PREVIOUS PAGE WAS BLANK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ALBEMARLE COUNTY SCHOOL BOARD,*
Petitioner,

v.

SUSAN PAXMAN,**
Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

*Susan Paxman and Leslie Gough apparently adopted the style "Henrico County School Board and Albemarle County School Board, et al." in their Petition as a shorthand by which to refer to the defendants "connected with Albemarle and Henrico Counties," which defendants were not dismissed by the Fourth Circuit Court of Appeals in *Paxman, et al.* v. *Campbell, et al.*, 612 F.2d at 854. In this Cross-Petition For Writ Of Certiorari, petitioner, so as to avoid confusion, will adopt this shorthand to refer to all defendants connected with Albemarle County. These defendants include: Clarence S. McClure, Comer Smith, Douglas White, Allen Kindrick, Carl M. Van Fossen, H. Edward Chapman, and Rodger Rinehart, Jr. For a full style of the case before the Fourth Circuit Court of Appeals see Appendix to Mrs. Paxman and Mrs. Gough's Petition For Writ of Certiorari, pp. 22a-29a.

**Since both the defendant class and the plaintiff class have been dismissed, Mrs. Paxman and Mrs. Gough no longer present claims of a representative type, and Mrs. Gough has no basis for any claim for relief or attorneys' fees against Albemarle County School Board.

OPINIONS BELOW*

Paxman, et al. v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980).

Paxman, et al. v. *Wilkerson, et al.*, 390 F. Supp. 442 (E.D. Va. 1975).

JURISDICTION

On January 2, 1980, the Fourth Circuit Court of Appeals entered its decision in *Paxman,* and as part of its holding granted Mrs. Paxman, an as yet undetermined, appellate attorneys' fee. A Petition For Rehearing en banc to address issues other than the question of attorneys' fees was denied on March 27, 1980. Petitioner files this Cross-Petition For Writ of Certiorari pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States. Petitioner received the original Petition For Writ Of Certiorari to which this Cross-Petition For Writ Of Certiorari corresponds on August 22, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

42 U.S.C. § 1988:

Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object,

*To avoid duplication, the opinions below, which are set forth in full in the Appendix to Mrs. Paxman and Mrs. Gough's Petition For Writ Of Certiorari are not reproduced.

or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction, of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This litigation began December 6, 1971, when two teachers, Susan Paxman and Leslie Gough, filed a class action under 42 U.S.C. § 1983 against members of the Albemarle and Henrico County School Boards challenging their maternity leave policies. Mrs. Paxman and Mrs. Gough based jurisdiction of the United States District Court below on 28 U.S.C. §§ 1343(3) and 2201.

In 1972, Albemarle County voluntarily abandoned the challenged maternity leave policy, which had been approved by the Albemarle Education Association,[1] and did not seek

[1] The Albemarle Education Association, the local arm of the National Education Association, approved the maternity leave policy of Albemarle County challenged in this suit. Deposition of Susan Paxman, pp. 31-32, Mar. 7, 1972 (Appendix to proceeding before Fourth Circuit Court of Appeals (App.), pp. 325-26); Deposition of Warren Comer Smith, pp. 4-5, Mar. 7, 1972 (App. 388-89).

to reinstate it despite the Fourth Circuit Court of Appeals' decision in *Cohen* v. *Chesterfield County Board of Education*, 473 F.2d 395 (4th Cir. 1973) (en banc) *rev'd sub nom., Cleveland Board of Education* v. *LeFleur*, 414 U.S. 632 (1974), upholding similar maternity leave policies. Since 1972, the thrust of this litigation has become increasingly artificial and inapplicable to Mrs. Paxman.

On January 2, 1980, in an en banc decision on rehearing the Fourth Circuit Court of Appeals, substantially reversed the district court's decision in *Paxman*. The appellate court reversed the judgment of the district court that would have certified both a plaintiff class and a defendant class.[2] The court then dismissed all defendants except those connected with Albemarle and Henrico County.[3] The appellate court next reversed the district court's award of monetary relief.[4] Four of seven judges then voted to grant reinstatement[5] even though Mrs. Paxman never sought reinstatement following the end of pregnancy. Moreover, there is no indication that she now seeks reinstatement. The Fourth Circuit Court of Appeals then awarded to Mrs. Paxman and Mrs. Gough appellate attorneys' fees of an as yet undetermined amount.[6]

---

[2] 612 F.2d at 850-51, 854.

[3] *Id.* at 854.

[4] *Id.* at 850-51 (per curiam, summary), 855-60 (Widner, denial of monetary relief based upon "good faith" immunity), 864 (Haynsworth, denial of monetary relief to Paxman based upon lack of constitutional violation), 875 (Russell, denial of monetary relief to Paxman based upon lack of constitutional violation), 875 (Phillips, denial of monetary relief to Paxman based upon lack of constitutional violation).

[5] *Id. at* 851, 860-61 (Widner, Winter, Butzner and Hall).

[6] *Id.* at 851 (per curiam, summary).

REASONS FOR ALLOWANCE OF THE WRIT

A. Mrs. Paxman Suffered No Constitutional Wrong.

The actions of the Albemarle County School Board involved no deprivation of the constitutional rights of Mrs. Paxman. In the spring of 1971, Mrs. Paxman signed an employment contract, and became aware of her pregnancy several days later. Mrs. Paxman then notified the school board of her pregnancy. Several weeks before the beginning of the fall school term, the school board informed her that her employment was terminated and that the school board would replace her with a teacher who could be expected to teach throughout the school year. Albemarle County's maternity policy expressly permitted the school board to immediately terminate Mrs. Paxman under these facts.[7] In *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), this Court recognized the importance of continuity of instruction.[8] While under *LaFleur* a teacher who discovers her pregnancy during the school year has the right to determine when she will terminate and thus create a discontinuity, nothing in *LaFleur* suggests that Albemarle could not consider continuity of instruction and hire someone else when the pregnancy was known well before the start of the school year. By doing this, it would avoid the known disruption, which would occur when she had to stop work because of the birth of the child. Circuit Judges Haynesworth, Russell and Phillips agreed with this analysis and concluded that "Mrs. Paxman suffered no constitutional wrong."[9] Contrary to the patchwork decision of the Fourth Circuit Court of Appeals, the Albemarle County School Board did not violate the constitutional rights of Mrs. Paxman.

---

[7] *Id.* at 864.
[8] 414 U.S. at 641-42.
[9] *Id.* at 864, 874-75.

B. The Fourth Circuit Court of Appeals Improperly Awarded Attorneys' Fees To Mrs. Paxman.

The only relief obtained by Mrs. Paxman on appeal to the Fourth Circuit Court of Appeals was the grant of reinstatement. With respect to this relief Chief Judge Haynesworth states:

> There is in this case no showing of any failure to comply with any reemployment commitment. Neither teacher sought postbirth reemployment, and neither was wrongly denied it. Under these circumstances "reinstatement" to a position never sought seems entirely inappropriate.[10]

The maternity leave policy of Albemarle County expressly provided for reinstatement following the end of pregnancy. In fact, Albemarle County had a more liberal provision for reinstatement than that mandated by *LaFleur*.[11] The relief granted to Mrs. Paxman by the Fourth Circuit Court of Appeals is artificial because she does not now and has never sought reinstatement, which was available to her under Albemarle County's maternity leave policy.

Three judges for the Fourth Circuit Court of Appeals would grant an appellate attorneys' fee of $500[12] and four judges would remand the case for ascertainment of an appellate attorneys' fee in excess of $500.[13] For the Fourth Circuit Court of Appeals to base an award of appellate attorneys' fees on a grant of reinstatement for a teacher who does not now and who has never sought reinstatement is merely a fiction. Mrs. Paxman is not entitled to attorneys' fees for obtaining relief that she could have received upon request following the end of pregnancy.

---

[10] *Id.* at 863.
[11] *See* Id. at 862.
[12] *Id.* at 851.
[13] *Id.*

An additional reason why Mrs. Paxman is not entitled to attorneys' fees is that the National Education Association (NEA) through the DuShane Fund is financing this litigation.[14] Further, Mrs. Paxman has no obligation under their agreement to repay any of the litigation costs incurred by the NEA in this suit. Her only obligation would be to repay to the extent of her monetary recovery.[15]

In sum, petitioner asks this Court to find in accordance with three judges of the Fourth Circuit Court of Appeals that Mrs. Paxman suffered no constitutional wrong.

Further, petitioner asks this Court to reverse that part of the decision of the Fourth Circuit Court of Appeals that held that Mrs. Paxman is entitled to attorneys' fees.

CONCLUSION

For the foregoing reasons, petitioner urges the Court to grant its Cross-Petition For Writ Of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

JAMES L. SANDERLIN
JOHN W. BURKE, III
McGUIRE, WOODS & BATTLE
1400 Ross Building
Richmond, Virginia 23219
(804) 644-4131

Attorneys for
Albemarle County School Board

September, 1980

---

[14] Deposition of Susan Paxman, pp. 45 to 46, Mar. 7, 1972.
[15] *Id.*